Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

RICHARD BARNETT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal witness tampering statute clearly and unambiguously states that any person who "gives, offers or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court," violates federal law. *See,* 18 U.S.C. §201(c)(2). Given this clear statute, and the legislative intention of maintaining the integrity of court proceedings that induced its adoption, may the Government nevertheless pay a witness for testimony that inculpates a criminal defendant?

PARTIES TO THE PROCEEDING

Pursuant to United States Supreme Court Rule 29.6, Petitioner states that the Petitioner in this *Petition* is Richard Barnett. The Respondent in this *Petition* is the United States of America. Richard Barnett is a natural person of the age of majority.

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MAY IT PLEASE THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Richard Barnett, Petitioner-Defendant herein, respectfully petitions the United States Supreme Court to grant a writ of certiorari and review the decision of the United States Court of Appeals for the Fifth Circuit in this matter.

OPINIONS BELOW

The decision of the United States Fifth Circuit Court of Appeals in this matter is reported at 197 F.3d 138 and is contained in Petitioner's Appendix at App. 1-17. The order of the Fifth Circuit denying rehearing is also unreported. It is attached hereto as App. 21.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered an opinion affirming Petitioner's conviction of the crimes charged in this matter on November 22, 1999. Petitioner timely applied for rehearing and the Fifth Circuit denied his petition for rehearing on December 28, 1999. This Court now has jurisdiction over this matter pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant statutory principle, concerning the bribery of a witness for providing testimony in a criminal proceeding, is 18 U.S.C. §201(c)(2). It states:

> Whoever –
>
> > (2) directly or indirectly, gives, offers or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom.

STATEMENT

This case squarely presents the question of whether the clear language of 18 U.S.C. §201 precludes the Government from paying a witness for testimony given in a federal criminal proceeding. The circuit courts have grappled with this issue and have, to a substantial degree, differed in their answers to the question. This difference among the circuits, and the compelling nature of the issues presented, requires intervention by this Court.

1. Richard Barnett, a petroleum engineer and businessman in Lafayette, Louisiana, joined forces with his attorney – Ernest L. Parker – and two others to purchase the oilfield waste disposal company known as Campbell

Wells Corporation. The business became extraordinarily successful and turned a great profit during this period. Unfortunately, at the same time, Barnett's personal finances had declined to the point of near bankruptcy.

At this point, Parker intervened and asked Barnett to allow Parker to hold his Campbell Wells stock in trust until Barnett could alleviate his personal financial problems. Barnett, who considered Parker to be his friend as well as his attorney, trusted Parker enough to assent to this arrangement. Barnett's financial situation soon improved and he went to Parker for the return of his stock. Parker refused to return the shares, which by this time had a value well in excess of $9 million, and compelled Barnett to file suit for the return of his assets. Parker further transferred Barnett's one-half of Campbell Wells to Logan Nichols, one of the original shareholders at Campbell Wells. Parker has bitterly fought both the suit of Barnett and that of William Davis – the fourth charter shareholder of Campbell Wells – and has continued to divest himself of assets necessary to satisfy his obligations to Barnett and Davis.

Some time in 1997, Barnett traveled to Belize to work on a project generated by his petroleum engineering firm, Marsh Engineering, Inc. In Belize he began working out at the gym known as Body 2000. While frequenting the gym, Barnett met Rushiel Bevans, a bodybuilder and personal trainer employed at the gym. Bevans had an interesting history. Not only was he the reigning bodybuilding champion of Belize at the time of his acquaintance with Barnett, he further had extensive experience on both sides of the criminal justice system. Evidence at trial established that Bevans consistently evaded his taxes

in Belize, that he entered the United States as an illegal alien, was suspected of dealing in illegal drugs between the United States and Columbia, and that he was convicted in the United States for illegally transporting firearms in interstate commerce. Paradoxically, Bevans also functions as a sometime agent of the United States government, and has in the past served as an informant for the government. Bevans testified at trial that during his previous experience as an informant, agents of the FBI and DEA told him "that the government would give me whatever I want and if it ever gets hot they would fly me out of the country."

During Barnett's conversations with Bevans, he apparently told Bevans about the stock taken from him by Parker and given to Nichols. Though the testimony is disputed as to exactly what and how Barnett recounted his dealings with Parker and Nichols, the record indicates that he vented a great deal of frustration at his two former colleagues, and expressed anger at the two men who had deprived him of over $9 million in stock. Bevans further testified that Barnett asked him to find someone in the United States who could kill Parker and Nichols. At this point, Bevans contacted his former FBI colleagues and informed them that Barnett had solicited him to kill two men. Bevans further began surreptitiously taping his conversations with Barnett and turning the tapes over to the FBI. In each of the conversations, he encouraged the furtherance of the alleged scheme to kill Nichols and Barnett – according to the testimony of Richard Barnett, Bevans went so far as to threaten Barnett's family when Barnett sought to withdraw from the transaction. Soon thereafter, the government arrested Barnett and an

alleged accomplice, Virgil Drake, and charged them with solicitation of murder and conspiracy to solicit murder.

At the trial of Barnett and Drake, the government centered its case around the testimony of Rushiel Bevans. It soon became apparent, however, that Bevans and the government had an agreement that he would be compensated for inculpating Barnett in the same manner as the government had promised to compensate him in the past. Discussing his initial conversations with agent Art Elliott of the FBI, Bevans testified:

> Q: There is one other thing you wanted when you were negotiating with him. You wanted something from your wife, correct?
>
> A: I wanted my stuff from my wife. She got some important documents in a computer for me, my personal things; and I wanted to get them. That's what I asked him for. No money.

Despite his allegations that he asked for "no money," it soon became apparent during Bevans' testimony that he had entered into some form of deal with the government to obtain money for his testimony. Characterized variously as a "gift", a "reward" and as other things, the government paid Bevans $7500 on the eve of his testimony against Barnett. According to Bevans, the government told him "that was some gift. Like I tell him, 'I didn't ask you for anything.' He say, 'Well, he feel like I deserve it.' " Bevans ultimately testified for the government and secured Barnett's and Drake's convictions.

2. On August 15, 1997, the United States indicted Richard Barnett and Virgil Drake on one count of solicitation of murder, and one count of conspiracy to commit murder for hire in violation of 18 U.S.C. §§1958 and 2. The six-day trial of the indictment took place from December 17-December 22, 1997. On December 22, 1997, the jury returned a verdict finding Drake and Barnett guilty on both counts. The trial judge subsequently sentenced Barnett to serve a period of imprisonment of 151-188 months and 24-36 months of supervised release.

On appeal, the Fifth Circuit affirmed the conviction of Barnett but reversed that of the only alleged co-conspirator, Virgil Drake. The appellate court's opinion gave short consideration to the ultimately significant question of whether or not the government violated the provisions of 18 U.S.C. §201 by paying Rushiel Bevans for his testimony. Equating the granting of leniency with the payment of money, and finding that the validity of the former vindicated the latter, the appellate court held that "Because of these safeguards and because 'the compensated witness and the witness promised a reduced sentence are indistinguishable in principle and should be dealt with in the same way,' we hold that 18 U.S.C. §201(c)(2) is not violated when prosecutors compensate informants for their cooperation." App. 11-12.

Barnett timely appealed for panel rehearing of the district court decision on December 13, 1999. The Fifth Circuit denied that petition for rehearing on December 29, 1999. Barnett now seeks certiorari from this Court for review of that decision.

REASONS FOR GRANTING THE WRIT

1. The clear and express language of 18 U.S.C. §201 makes it a federal criminal offense to procure a witness' testimony through the payment of a thing of value. Designed to safeguard the integrity of the judicial system from the taint that such paid testimony necessarily imposes on criminal trials, the statute specifically inculpates "whoever directly or indirectly, gives, offers or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court." 18 U.S.C. §201(c)(2). Underlying this statute is the common-sense proposition, adopted by the framers of the provision, that no one should profit from the testimony of an individual paid to convict a criminal defendant. To the extent that judicial decisions depart from this clearly expressed intent, they violate the plain wording of the statute and contravene the congressional prohibition against such practices.

No one can seriously question that the Government violates the plain wording of this provision when it provides a witness with an economic benefit in order for that witness to provide testimony in a criminal trial. Though some courts have questioned whether "whoever" includes government agents, any such exclusion finds no home in the language of the statute. The dictionary defines the word "whoever" as "anyone that; any person who" and "what person ever." *America Heritage Dictionary* 1463 (1981). *See also, Nardone v. United States*, 302 U.S. 379, 383-84 (1937) (holding that "whoever" encompasses

agents of the government). Adopting the rules of statutory construction that govern interpretations of federal statutes, Congress explicitly delineated that "whoever" encompasses "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. §1. Individuals necessarily encompass governmental prosecutors. Congress could have included a less-inclusive pronoun when it decreed this statute – it did not. Congress could have stated that any "private person who" procured testimony through the provision of an economic benefit was guilty of the offense of witness tampering – it did not. By choosing this all-encompassing pronoun in its prohibition of witness tampering, Congress expressed its unambiguous intent that no person or entity pay a witness for testimony in a federal civil or criminal proceeding.

As to the substantive conduct proscribed, Congress expressed a similarly clear intent. The statute prohibits the exchange of any "thing of value" for witness testimony. No court has recognized, nor could it logically contend, that the payment of money in exchange for witness testimony does not constitute the exchange of a "thing of value" for that testimony. Indeed, even those courts questioning whether a promise of leniency by the Government falls within the statutory prohibition have found an exchange of economic benefit to fall squarely within the prohibition. *Compare, U.S. v. Condon,* 170 F.3d 687, 689 (7th Cir. 1999); *U.S. v. Ramsey,* 165 F.3d 980 (D.C.Cir. 1998) ("the Government has no recognized interest in paying a witness to give untruthful testimony and no absurdity would result in punishing a prosecutor who offers a witness money or any other thing of value to

obtain untruthful testimony.") Because the government cannot point to any longstanding historical tradition to contravene the clearly-expressed intent of Congress, it can find no rationale upon which to support its payment of a witness for giving testimony. Based on the plain language of the statute, paid-for testimony like that given in the instant case against Richard Barnett should suffer exclusion.

2. A discernable split has emerged between those circuits that permit the payment of witnesses for testimony and those that prohibit the practice as unconscionably in conflict with the principles of Section 201. This confusion amongst the circuits has led to decisions that provide a non-uniform assessment of the extent to which the Government can confer specific economic benefits on witnesses in exchange for testimony. The time has now come for this Court to intervene and provide some standards that prohibit the insipid cancer of bought testimony to infect the judicial system.

A number of federal courts have recognized that – unlike a promise of leniency conferred on a witness in exchange for testimony – actually conferring an independent economic benefit upon a witness lacks any statutory or historical underpinning. In *Condon, supra,* the Seventh Circuit recognized that excluding federal prosecutors from the ambit of Section 201 would "permit prosecutors to pay cash for favorable testimony, a practice that lacks the statutory and historical support of immunity and sentence reduction." *Condon,* 170 F.3d at 689. That the ability of a prosecutor to pay a government informant lacks substantive grounding is apparent from the history of the plea bargaining scheme classically recognized in

the United States. Plea bargaining has long existed as a historical practice and, to the extent that anyone can say a promise of recommended leniency constitutes a "thing of value", then historical practice exempts it from the reach of Section 201. *See, U.S. v. Johnson*, 169 F.3d 1092, 1098 (8th Cir. 1999) ("the statute does not sweep so broadly as to prevent prosecutors from offering leniency to an individual in exchange for truthful testimony.") Yet a plea bargain based on a recommendation of leniency only conveys a potential future thing that is not binding in any way on the district court's ability to sentence the accusing individual. Indeed, in *The Whiskey Cases*, 99 U.S. 594 (1878), this Court explicitly held that a public prosecutor had no authority to make a deal with a criminal defendant that would bind the district court to a course of action. Urging prosecutors to screen potential witnesses who may ask for mercy from the Sovereign, the Court admonished that "promise of pardon is never given in such an interview, nor any inducement held out beyond what the before-mentioned usage and practice of the courts allow." *Id.* at 606. *See also,* II Sir Matthew Hale, *The History of Pleas of the Crown* 280 (Sollom Emlyn ed. 1736) ("If a reward be promised to a person for giving his evidence before he gives it, this, if proved disables his testimony. And so for my own part I have always thought, that if a person have a promise of a pardon if he give evidence against one of his own confederates, this disables his testimony, if it be proved upon him.") Consequently, any promise of recommended leniency transcends no further than an indication that the prosecutor will issue a non-binding exhortation to the trial court.

On the other hand, the grant of money to a witness in exchange for testimony is precisely the type of present value exchange prohibited by Section 201. Although many courts have recognized and countenanced the payment of witnesses for testimony, they have done so with the greatest reluctance, cognizant of the taint that such testimony places on witness testimony. In its panel opinion in *U.S. v. Singleton*, 144 F.3d 1343 (10th Cir.), *en banc reh'g. granted and rev'd.*, 165 F.3d 1199 (9th Cir. 1999), the Tenth Circuit ringingly excoriated the use of paid witness testimony and held that the criminal justice system could not preserve its integrity through use of such informants. Although the *en banc* court reversed the panel decision, it did so over the ringing dissent of three judges of that Court, who stated:

> To suggest that government attorneys performing prosecutorial functions are beyond scrutiny because of who they represent is anomalous because it merges attorney and client. No one would suggest that an accused and his attorney are one in the same for purposes of compliance with constitutional, statutory and ethical norms. As discussed below, constraints on government prosecutors are not unusual, notwithstanding that the sovereign is the client. Merely because the government cannot be prosecuted if its agents violate a rule does not mean that the rule may be disregarded; to the contrary, the rule may be enforced by means other than prosecution, here by exclusion of evidence. *See Nardone v. United States*, 302 U.S. 379, 384-85, 82 L. Ed. 314, 58 S. Ct. 275 (1937). The remedy of exclusion serves as a deterrent, protects a court's integrity and allows a federal court the only means it has to enforce federal law.

Id. at 1311 (Kelley, Seymour and Ebel JJ., dissenting). *Accord, U.S. v. Albanese*, 195 F.3d 389, 397 (8th Cir. 1999) (Heaney J., dissenting) ("To the contrary, the corrupting influence of money on testimony and the judicial process as a whole has long been a concern at common law, as amply illustrated by the *Singleton II* dissenters"); *Condon, supra* at 689.

In the aftermath of *Singleton II*, a number of federal courts have reserved the question of whether paying a witness for testimony differs from making an offer of leniency and thus violates Section 201. As the dissent recognized in *Albanese*:

> While the rejection of *Singleton I* may aptly be characterized as a "stampede," *United States v. Lowery*, 166 F.3d 1119, 1123 (11th Cir. 1999), other courts have recognized that the issue we face in this case is distinct from that in Singleton, see *United States v. Hunte*, 193 F.3d 173, 1999 U.S. App. LEXIS 20189, 1999 WL 649627, at *4 n. 4 (3d Cir. 1999) (reserving question of §201(c)(2)'s application where witness has received money from government in exchange for testimony); *United States v. Condon*, 170 F.3d 687, 689 (7th Cir. 1999) (rejecting argument that leniency in exchange for testimony violates §201(c)(3), but declining to hold that statute does not apply to federal prosecutors; "[t]hat approach, if taken seriously, would permit prosecutors to pay cash for favorable testimony, a practice that lacks the statutory and historical support of immunity and sentence reduction.")

Albanese, 195 F.3d at 397 n. 8. The Third Circuit in *Hunte* implied that it would refuse to grant permission to prosecutors to pay government witnesses, citing the district

court opinion in *U.S. v. Medina* to the effect that "there is no longstanding, well recognized, and deeply established governmental prerogative to give money or other valuable things to witnesses for their testimony. And there is no absurdity in denying prosecutors the right to do so. Far from it." *Hunte*, 193 F.3d at 175 n. 4 (citing *U.S. v. Medina*, 41 F. Supp. 2d 38, 51 (D. Mass. 1999)). This reluctance to permit payments to witnesses for testimony flies directly in the face of the Fifth Circuit decision in the instant matter. To resolve the conflict between the circuits caused by this reluctance requires this Court to grant this *Petition*.

3. In this case, the Fifth Circuit has embraced what other courts have refused to countenance – direct payment of witnesses for testimony given in a criminal trial. This decision ignores the clear and express intent of the federal "anti-gratuity" statute codified in 18 U.S.C. §201. It further derives from a *non sequitur* that equates the giving of money to a government witness with the promise of recommended leniency. This Court has never before addressed this question directly. The result has been confusion amongst the circuits and legal decisions that undermine the basic sense of justice and fair play embodied by the American legal system. Rectification of this confusion requires deliberation by this Court.

The Fifth Circuit in the instant matter candidly admitted that Rushiel Bevans, the Government's key witness, received substantial things of value in return for his testimony. It recognized that Bevans received $7500 in exchange for the testimony that he provided in this matter. *See*, App. 11. Yet the appellate court opted to rely on cross-examination instead of outright exclusion as the

means by which to alleviate any taint such payment had on the proceedings that led to Barnett's conviction. It then made the supreme leap, reiterated from its previous decision in *U.S. v. Cervantes-Pacheco*, 826 F.3d 310 (5th Cir. 1987), that "the compensated witness and the witness promised a reduced sentence are indistinguishable in principle and should be dealt with the same way." App. 11. The *non sequitur* created by this juxtaposition of compensation and leniency violates the clear and express language of Section 201.

The substantial difference between paying a witness and granting a witness a promise of recommended leniency, one that certainly renders the two "distinguishable", lies in the plain language of Section 201. Section 201 expressly prohibits the payment of money to a witness in exchange for testimony. *See*, 18 U.S.C. §201(c)(2). While other statutes grant the government the ability to make sentencing recommendations and other dispensations in exchange for cooperation and testimony, *compare, e.g.* 18 U.S.C. §6001-6005, and thus implicitly allow the government to grant leniency, the only statutes permitting the payment of witnesses are those allowing payment of standard witness fees and – in the case of relocated witnesses under federal protection – fixed living expenses. *See*, 18 U.S.C. §3521(a). Reading these statutes *in pari materia* leads to the conclusion that plea-bargaining is permissible under the federal statutory scheme. Because the only statute relative to actual payment of a witness prohibits it, however, no such logic can obtain with respect to direct payment for testimony. Therefore, while it may be permissible to grant leniency to a potential witness, it does not directly follow that the

government can go one step further and pay the witness for his or her testimony.

Not only does the equation of leniency with monetary payment violate the plain language of Section 201, it further undermines essential concepts of fairness and equity that provide the criminal justice system with its foundation. The government has virtually unlimited resources at its disposal for the prosecution of criminals. Possession of the ability to recommend and grant leniency does itself constitute an exclusive prerogative of the sovereign that cannot be undermined by statute or jurisprudence. *See, U.S. v. Ramsey,* 165 F.3d 980, 988 (D.C.Cir. 1999). To further extend the sovereign's power to encompass the enlistment of witnesses, through the payment of money to potential witnesses, tips the scales too far in terms of the resources available at its disposal.

This case presents a substantial question of public policy for this Court to consider. As the controversy surrounding the two *Singleton* opinions demonstrates, the public perception of the effect that payment has on criminal proceedings is acute. Permitting prosecutors to engage in such practices undermines "the integrity, fairness, and credibility of our system of criminal justice. Criminal judgments are accepted by society at large, and even by individual defendants, only because our system of justice is painstakingly fair." *Singleton, supra* at 1309. By failing to recognize this maxim, the Fifth Circuit has created a direct split between its decision in this area and the opinions of the Seventh and Third Circuits in *Condon* and *Hunte*. It has further exacerbated the confusion amongst the federal circuits that has led to the issuance of

opinions wholly devoid of adherence to standard principles of justice and fair play in the criminal justice system. This Court should therefore grant this petition and address this compelling issue of legal and public policy.

CONCLUSION

For the foregoing reasons, Richard Barnett respectfully moves this Court to grant his petition for writ of certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30365

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD D. BARNETT, VIRGIL R. DRAKE,

Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Louisiana

(Filed Nov. 22, 1999)

Before POLITZ, DeMOSS and BENAVIDES, Circuit Judges.

POLITZ, Circuit Judge:

Richard D. Barnett and Virgil R. Drake appeal convictions for conspiracy to commit murder for hire in violation of 18 U.S.C. §§ 371 and 1958, and for aiding and abetting each other in attempted murder for hire in violation of 18 U.S.C. §§ 1958 and 2. For the reasons assigned we affirm the convictions of Barnett and reverse the convictions of Drake.

Background

The record establishes that the relevant events began in early July 1997 in Belize City, Belize where Barnett, an

American citizen, had been working for several months. He was scheduled to return to the United States on July 12. While in Belize he frequented a local gymnasium, Body 2000, and became acquainted with Rushiel Bevans, a Belize native, who worked there as a trainer and bodybuilder. On July 11, Barnett and Bevans had dinner together at a restaurant.[1] They left the restaurant in Barnett's truck. Just prior to leaving, Bevans activated a miniature tape recorder hidden in his clothing, and recorded their conversation.

While in Barnett's truck they discussed plans for Bevans to travel to Lafayette, Louisiana and kill one or possibly two individuals. One of the intended victims was Ernest L. Parker, a Lafayette attorney who Barnett claimed had cheated him out of money in a crooked stock transfer. Litigation between Parker and Barnett was pending and Barnett made no secret of his animosity towards Parker. Barnett questioned Bevans about his seriousness in carrying out the homicide. He asked Bevans if he had a passport, gave him detailed instructions on construction of a silencer for use with a firearm, discussed the amount of money he would pay Bevans, and

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[1] Barnett contends that the purpose of the meeting was to discuss his plans to start a health food business in Belize and to seek the participation of Bevans who was holder of the "Mr. Belize" bodybuilding title. Bevans maintains that the meeting was arranged the previous day at Body 2000 when Barnett approached him and said, "I am looking for a son-of-a-bitch to kill someone for me." Bevans testified that the July 11 meeting was to discuss this subject. He brought a tape recorder with him and recorded their conversation. At trial Barnett proffered the notes of DEA agent Art Elliot reflecting a call from Bevans on July 10 informing about the meeting scheduled for the next day.

offered a "twenty Gs kicker" if the murder resulted in a prompt settlement of his lawsuit against Parker. He advised of Parker's habits, such as his travels and the time he arose in the morning. He also told Bevans that he had contemplated committing the murder himself and described how he might dispose of his clothing to prevent the police from finding traces of gun powder on them.

Barnett continued the discussion, explaining that he had a "brother" in the United States who had made arrangements with a potential assassin but those plans went awry when that person was arrested on an unrelated matter. He promised Bevans more information after he spoke with the "brother" and suggested that they meet the next day at Body 2000. Bevans, in turn, boasted of his time in Leavenworth, told Barnett the preferred method of contact between them, explained how money should be transferred, when he would obtain a firearm, and other details designed to persuade Barnett of his ability to break and evade the law. The next day Barnett gave Bevans written information, including where Virgil Drake could be reached in Louisiana, and a series of code phrases for contacting him.[2] Barnett then left for the

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[2] The note instructed Bevans to call Drake and leave his return number and a message that he needed Drake to inspect a water well near Abbeville, Louisiana. Drake was to respond, "Joe, where can papers on well be inspected?" At that, Bevans was to disclose his location so that Drake could bring him additional information. Barnett claims that he went to Bevans' home in order to terminate the scheme, and that it was only after Bevans threatened to harm his children that he brought Bevans the information on how to contact Drake.

United States. Bevans contacted Art Elliot, a DEA agent stationed in Belize, who contacted the FBI.

Upon arriving in Lafayette, Bevans contacted Drake as instructed. Drake met Bevans and FBI undercover agent Mike Chatman, posing as Bevans' former cellmate at Leavenworth, and delivered maps to Parker's house and to the house of a second target, Logan Nichols, and biographical data and a photo of Parker. Bevans and Chatman told Drake they needed more money and Drake agreed to pass that message on to Barnett in Houston. Shortly thereafter Barnett called Bevans and arranged a meeting in Orange, Texas that afternoon.

At that meeting Barnett, Bevans, and Chatman finalized plans for the murder. Barnett described Parker's auto, the golf club Parker frequented, and the homes of Parker and Nichols and he offered to cover any additional expenses. Later that day Drake drove Bevans and Chatman to Parker's home and showed them the best route from it to Interstate 10.

Barnett and Drake were arrested and charged with conspiracy to commit murder for hire and with aiding and abetting each other in attempted murder for hire. At trial, Barnett sought to explain all of the taped conversations as a combination of barroom talk, nervous chatter, and attempts to extricate himself from situations with Bevans and Chatman in which he felt he and his family were in danger.[3] He claimed that he never wanted Parker

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[3] Barnett sought to support this claim with evidence that Bevans was a dangerous character. He questioned Bevans about his time in prison for gun running activities, his alleged drug

and Nichols killed, and was only feigning agreement with Bevans in order to placate him. He requested, but did not receive, an entrapment instruction. Drake argued that he was not sufficiently aware of what was going on to support convictions for conspiracy and aiding and abetting. The jury returned verdicts of guilty on both counts for both defendants. Barnett received a 60-month sentence on Count I and a 120-month sentence on Count II, to be served consecutively. Drake received a 60-month sentence on Count I and a 97-month sentence on Count II, to be served concurrently. Both timely appealed.

Analysis

Entrapment.

Barnett contends that the district court erred by not granting his request for an entrapment instruction. We review the refusal to give a requested jury instruction for abuse of discretion.[4] In general, the trial court is given great latitude in formulating its instructions,[5] and we will

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activities, use of an assumed name, alleged sham marriage, dishonorable discharge from the United States military, deportation from the United States, current tax deficiency in Belize, and a fistfight with his boss. He also claimed Bevans knew where his children lived in Louisiana, and said that he suspected Bevans of being involved in a hit-and-run accident in which his daughter was injured. His hope, he says, was that if he paid Bevans enough money, Bevans would simply leave him alone.

[4] *United States v. Pennington*, 20 F.3d 593 (5th Cir.1994).

[5] *United States v. Rochester*, 898 F.2d 971 (5th Cir.1990).

not find an abuse of discretion where the "instructions . . . fairly and adequately cover the issues presented by the case."[6] The trial court must be mindful, however, of the defendant's right to request and receive jury instructions regarding the particulars of his defense which, ultimately, could affect the jury's verdict. "It has long been well established in this Circuit that it is reversible error to refuse a charge on a defense theory for which there is an evidentiary foundation and which, if believed by the jury, would be legally sufficient" to support a verdict of not guilty.[7]

The trial court must charge the jury on a defense theory if there is sufficient evidence reasonably to find in favor of the defendant thereon.[8] To warrant an entrapment instruction the defendant need only show a basis for reasonable doubt on the ultimate issue whether the criminal intent originated with the government.[9] The mere assertion of entrapment does not suffice.[10] The defendant must present evidence sufficient to sustain a jury finding on both prongs of the entrapment defense; that is, "the record must contain sufficient evidence of both inducement and lack of predisposition to raise an

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[6] *United States v. Mollier*, 853 F.2d 1169, 1174 (5th Cir.1988).

[7] *United States v. Rubio*, 834 F.2d 442, 446 (5th Cir.1987) (quoting *United States v. Lewis*, 592 F.2d 1282, 1285 (5th Cir.1979)).

[8] *United States v. Collins*, 972 F.2d 1385 (5th Cir.1992) (citing Mathews v. United States, 485 U.S. 58 (1988)).

[9] *United States v. Bradfield*, 113 F.3d 515 (5th Cir.1997) (citing *United States v. Nations*, 764 F.2d 1073 (5th Cir.1985)).

[10] *Mathews v. United States*, 485 U.S. 58 (1988); *United States v. Menesses*, 962 F.2d 420 (5th Cir.1992).

entrapment issue; the entrapment issue need not be presented to the jury if the evidence does not raise the issue to that degree."[11]

Barnett claims that Bevans induced his participation in the murder for hire scheme, testifying that the idea of killing Parker was initiated by Bevans before any of the taped conversations, and that Bevans prevented his withdrawal when he went to Bevans' house.

Barnett may satisfy the government inducement prong of entrapment only if Bevans was a government agent at the time of the alleged inducement. The defense of entrapment is not applicable where one is induced to engage in criminal activity by a private citizen acting alone.[12] Entrapment is available only to the innocent defendant whom the government seeks to punish for an offense "which is the product of the creative activity of its own officials"[13] or "born in the minds of government agents."[14] "Entrapment as a defense occurs only when criminal conduct is the product of the creative activity of government officials or those private citizens acting under government direction."[15]

Barnett contends that Bevans was an agent of the government because of his previous contacts with Elliot

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[11] *Bradfield*, 113 F.3d at 521.

[12] *United States v. Prieto-Olivas*, 419 F.2d 149 (5th Cir.1969); *Pearson v. United States*, 378 F.2d 555 (5th Cir.1967).

[13] *Sorrells v. United States*, 287 U.S. 435 (1932).

[14] *Prieto-Olivas*, 419 F.2d at 150 (citing *Kivette v. United States*, 230 F.2d 749 (5th Cir.1956)).

[15] *United States v. Dodson*, 481 F.2d 656, 657 (5th Cir.1972).

and the DEA. Bevans had known Agent Elliot during the more than two years that Elliot worked out at Body 2000. On one prior occasion Bevans provided the DEA with information that someone at the U.S. Embassy in Belize might be in danger. Bevans refused to cooperate further in the investigation, despite being promised that the government would "take care of him." On July 10, the day Bevans asserts Barnett first suggested the deal, Bevans called Elliot. Elliot's notes of that call reflect that Elliot told Bevans to call when he had more details. Bevans and Elliot did not speak again until after Barnett left Belize on July 12. Elliot later heard the July 11 tape and put Bevans in contact with the FBI. FBI agents then began to give Bevans directions and promised to fly him to the United States and help him find his wife in exchange for his cooperation with the remainder of the investigation.

The district court did not abuse its discretion in concluding that Barnett's evidence was insufficient to establish a jury question as to Bevans' status as a government agent prior to July 13, the time Barnett alleges Bevans induced him to participate in the murder for hire scheme. Barnett failed to produce any evidence that Bevans acted under the direction or supervision of the government during the initial stages of the scheme. Agent Elliot's notes on July 10 reflect only that he passively received information and asked Bevans to keep him informed of future developments. This was an informal request for future information, not an agreement that Bevans would work on behalf of the government to obtain that information.[16]

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[16] *United States v. Busby*, 780 F.2d 804 (9th Cir.1986).

Barnett correctly points out, however, that an informer may be an agent of the government even if its officials do not directly orchestrate his activities. Law enforcement authorities may not make promises to private citizen informants in exchange for their efforts in instigating crimes and then secure insulation from charges of entrapment simply by leaving the informers to their own devices.[17] To allow such a practice would permit the type of government overreaching that the entrapment defense was designed to prevent. Bevans, however, cannot be characterized as such a "paid government informer" or "active government informer" prior to July 13. The record contains no evidence that the government made it Bevans' "job" to be the instigator of similar prosecutions.[18] Barnett produced no evidence that Bevans had been promised anything in exchange for compromising him. Bevans may have seen value in ingratiating himself with the authorities because of his criminal history and his tax difficulties, but that he may have anticipated compensation for providing information does not make him an agent of the government.[19] Barnett failed to produce evidence sufficient to sustain a finding that he was induced by the government to commit any crime, and we must therefore conclude that the district court did not abuse its discretion by declining to give an entrapment charge.

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[17] *Sherman v. United States*, 356 U.S. 369 (1958); *United States v. Waddell*, 507 F.2d 1226 (5th Cir.1975).

[18] *Sherman*, 356 U.S. 369.

[19] *Busby*, 780 F.2d 804.

Denial of the Motion for Continuance.

Barnett next contends that the trial court erred by refusing to grant his motion for a continuance. He made several requests for Brady[20] material prior to trial. Each of his requests was met with a representation by the government that no such material existed. Then on the first day of trial, the government delivered a report from the Joint Intelligence Coordinating Center containing information about Bevans' criminal history and his contacts. Barnett claims that he needed a continuance in order to investigate Bevans' background adequately.

We review the denial of a motion for continuance for abuse of discretion.[21] To prevail, the movant must show that the denial resulted in " 'specific and compelling' or 'serious' prejudice."[22] Barnett maintains that he needed information on Bevans' criminal history and criminal contacts in order to develop his theory that Bevans entrapped him to ingratiate himself with the authorities. Bevans was not a government agent. Whatever his motives, he therefore could not have entrapped Barnett. The failure to produce the information at an earlier time did not prejudice Barnett's defense, and the denial of the continuance was not an abuse of discretion. We find no "specific and compelling" or "serious" prejudice.

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[20] *Brady v. Maryland*, 373 U.S. 83 (1963).

[21] *United States v. Krout*, 66 F.3d 1420 (5th Cir.1995).

[22] *Id.* at 1436.

Admission of Informant's Testimony.

Barnett and Drake both contend that Bevans' testimony should not have been admitted at trial because he received $7500 for his participation in the case. They assert that the payment violates 18 U.S.C. § 201(c)(2), which prohibits the giving of anything of value to a witness in exchange for testimony. This issue was not raised at trial and we review for plain error.

We previously have held that section 201(c)(2) is not violated when prosecutors offer leniency to a witness in exchange for testimony.[23] "[N]o practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence."[24] We have opted to protect the judicial process from the stain of perjury with other safeguards, including the prohibition on the use of perjured testimony, the requirement that the government disclose such arrangements, the opportunity for defense counsel to engage in rigorous cross-examination, and the instruction of the jury on the suspect nature of compensated testimony. Because of these safeguards and because "the compensated witness and the witness promised a reduced sentence are indistinguishable in principle and should be dealt with in the same way,"[25] we hold that 18

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[23] *United States v. Haese*, 162 F.3d 359 (5th Cir.1998).

[24] *Id.* at 366 (quoting *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir.1987)).

[25] *Cervantes-Pacheco*, 826 F.2d at 315.

U.S.C. § 201(c)(2) is not violated when prosecutors compensate informants for their cooperation.

Motion to Sever.

Drake maintains that the trial court erred by denying his motion to sever. He claims that the "spillover effect" of the evidence presented against Barnett confused the jury to such a degree that severance was required in order to avoid undue prejudice to his defense.

We review the denial of a motion to sever for abuse of discretion.[26] As a general rule, defendants who are indicted together are tried together.[27] The decision whether to sever the trials of persons indicted together is within the discretion of the trial court, and the denial of a severance will not furnish grounds for reversal unless the defendant can demonstrate specific compelling prejudice against which the district court was unable to afford protection.[28] A joint trial is especially appropriate when the defendants are alleged to have been participants in the same conspiracy.[29] Severance is necessary only when "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable determination of guilt or innocence."[30]

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[26] *United States v. Faulkner*, 17 F.3d 745 (5th Cir.), *cert. denied*, 513 U.S. 870 (1994).

[27] *Id.*

[28] *United States v. Hernandez*, 962 F.2d 1152 (5th Cir.1994).

[29] *Faulkner*, 17 F.3d 745.

[30] *United States v. Bermea*, 30 F.3d 1539, 1572 (5th Cir.1994).

We find that the district court acted within its discretion in denying Drake's motion to sever. Drake was not prejudiced in the presentation of any defenses as a result of being tried jointly with Barnett. Nor was severance required so that the testimony of a coconspirator could be compelled without violating the coconspirator's fifth amendment rights. In fact, Drake's only alleged coconspirator, Barnett, testified at trial, was cross examined by Drake's attorney, and generally gave information that supported Drake's defense. Stripped to its essentials, Drake simply argues that the quantum of evidence against Barnett and the chilling nature of the taped conversations between Barnett and Bevans made it impossible for the jury to decide his case fairly. Even if Drake's defense had been tainted to some degree by the evidence against Barnett, however, the existence of some spillover effect ordinarily does not require severance.[31] In this case, any prejudice that might have resulted from Drake's being tried with Barnett was neutralized by the trial court's instruction to the jury that it must consider the charges and evidence against Barnett and Drake separately.[32]

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[31] *Faulkner*, 17 F.3d 745.

[32] *United States v. Lindell*, 881 F.2d 1313 (5th Cir.1989) (holding that defendant must show that he suffered "specific and compelling prejudice" that could not be mitigated by lesser measures than severance, including a proper limiting instruction).

Sufficiency of the Evidence.

Finally, Drake argues that there was not sufficient evidence to support his conspiracy and aiding-and-abetting convictions. We review a claim of insufficient evidence to determine whether a rational trier of fact could have found that the evidence proved the essential elements of the crime beyond a reasonable doubt.[33] The evidence presented at trial is viewed with all reasonable inferences made in support of the jury's verdict.[34]

Drake argues, and the government concedes, that in order to obtain a conviction for either crime, the government must show beyond a reasonable doubt that Drake acted with the intent that a murder be committed in violation of the laws of any state or of the United States.

> It is a cardinal rule of conspiracy law that one does not become a coconspirator simply by virtue of the knowledge of a conspiracy and association with conspirators. . . . To connect the defendant to a conspiracy, the prosecution must demonstrate that the defendant agreed with others to join the conspiracy and participate in the achievement of the illegal objective.[35]

In order to convict a defendant of conspiracy to violate a federal statute, "the Government must prove at

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[33] *United States v. Ramirez*, 145 F.3d 345 (5th Cir.1998).

[34] *United States v. Thomas*, 120 F.3d 564 (5th Cir.1997).

[35] *United States v. Grassi*, 616 F.2d 1295, 1301 (5th Cir.1980) (citations omitted).

least the degree of criminal intent necessary for the substantive offense itself."[36] Likewise, in order to sustain its case that the defendant aided and abetted in the violation of a federal statute, the government must prove that the defendant "shared in the criminal intent of the principal."[37] Here, the underlying federal statute requires proof of "intent that a murder be committed in violation of the laws of any state or the United States. . . . "[38] Drake argues that he blindly followed Barnett's instructions and that he was never made aware of what Barnett was up to or the reason why Barnett had asked Bevans and Chatman to come to Lafayette.

The government's evidence on this issue essentially is two recorded meetings between Drake, Bevans, and Chatman that took place at the hotel in Lafayette and in Drake's truck while driving through Lafayette. At the hotel, Drake delivered a package containing maps to the homes of Parker and Nichols. Drake's fingerprints were on the maps. Drake appeared to be nervous during that meeting, suggesting consciousness of guilt. When asked directly about the extent of his knowledge by Chatman, Drake admitted that he knew "a lot of it" but was "not gonna say I know anything and I'm not gonna tell you I know everything." Later that evening, Drake drove Bevans and Chatman to Parker's home. It was clear that Drake knew that their objective involved Parker, because

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[36] *United States v. Feola*, 420 U.S. 671, 686 (1975); *United States v. Osgood*, 794 F.2d 1087 (5th Cir.1986).

[37] *United States v. Ortiz-Loya*, 777 F.2d 973, 980 (5th Cir.1985).

[38] 18 U.S.C. § 1958.

neither Bevans nor Chatman mentioned Parker's name or asked to be taken to his home. Drake stated that he formerly had been involved in law enforcement and that "this" meant that he would have been on "both sides of the fence." He knew a lot of people in the town of Jennings and refused to be seen there with Bevans and Chatman. After taking them to Parker's house, he instructed them on the quickest way to get to I-10. The government also avers that because Drake and Barnett were close friends, Drake must have known of Barnett's intense hatred for Parker. Finally, telephone records indicate that Drake and Barnett were in close contact during the relevant time period.

The foregoing is compelling evidence of the fact that Drake knew that Bevans and Chatman had been hired to perpetrate some unlawful act against Parker and Nichols. It does not, however, represent evidence that Drake knew that the unlawful act was murder. The government concedes that Bevans and Chatman did not use words like "kill," "murder," "death," "hit," or "contract" when talking with Drake as they had with Barnett. Nor did they discuss, or otherwise indicate, that they were carrying or intended to use any instrument that might be employed to carry out a murder. The evidence presented by the government is equally consistent with the possibility that Drake believed that Bevans and Chatman intended to kidnap or threaten Parker or a member of his family, or to vandalize or burglarize his house, or to obtain information about Parker that Barnett could use to extort a favorable settlement from him. The jury reflected confusion on this very point when it asked, "must we consider conspiracy to commit a crime or must we specifically consider a

conspiracy to commit 'murder for hire' to make/come to a decision according to the charges?"[39] The government's evidence that Drake was aware that some crime was afoot is not sufficient.[40] Because the record is devoid of evidence that Drake intended to conspire in or aid and abet the commission of murder for hire, we must reverse Drake's conviction on both counts.

Barnett's convictions for aiding and abetting and conspiracy to commit murder for hire are AFFIRMED. Drake's convictions for aiding and abetting and conspiracy to commit murder for hire are REVERSED.

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[39] In response to this question, the trial judge simply referred the jury to the indictment and the instructions. Drake does not question the propriety of this response; we need not consider it to decide this appeal.

[40] *United States v. Jordan*, 627 F.2d 683 (5th Cir.1980); *United States v. Ritter*, 989 F.2d 318 (9th Cir.1993).

UNITED STATES DISTRICT COURT
Western District of Louisiana at Lafayette

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	(Filed Mar. 24, 1998)
RICHARD D. BARNETT	(For Offenses Committed On or After November 1, 1987)
	Case Number: **6:97CR60033-001**
	TERENCE HART and KRAIG T. STRENGE
	Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____
[ ] pleaded nolo contendere to count(s) _____ ~~which (was) (were)~~ accepted by the court.

[X] was found guilty on count(s) 1 and 2 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 371	Conspiracy to commit offense against the United States, i.e., murder for hire.	08/05/1997	1

18 U.S.C. § 1958	Using interstate commerce facilities with intent to facilitate the commission of murder.	08/05/1997	2
18 U.S.C. § 2	Aiding and abetting others to commit murder.	08/05/1997	2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 436-70-2965

Defendant's Date of Birth: 06/01/1946

Defendant's USM No.: 76207-079

03/23/1998
Date of Imposition of Judgment

/s/ Tucker L. Melancon
Signature of Judicial Officer

Defendant's Residence Address: 806 Dafney Street Lafayette 70503	HONORABLE TUCKER L. MELANCON UNITED STATES DISTRICT JUDGE Name & Title of Judicial Officer
Defendant's Mailing Address: 806 Dafney Street Lafayette 70503	March 24, 1998 Date

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30365

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RICHARD D BARNETT; VIRGIL R DRAKE

Defendants - Appellants

Appeals from the United States District Court for the Western District of Louisiana, Lafayette

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ON PETITION FOR REHEARING

(Filed Dec. 29, 1999)

Before POLITZ, DeMOSS, and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing on behalf of Richard D Barnett filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge